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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 532

PATRICIA ROGERS, et al.,
Petitioners,

vs.

DR. EDGAR F. PAUL, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

An inquiry into the record in this case will readily reveal that there is no dispute or actually no room for dispute between the parties as to any legal principle involved. Further inquiry will inevitably lead to the conclusion that these respondents have not attempted to circumvent the requirements of the law in the matter of the integration of the school system of the respondent district, but to the contrary, have made a "prompt and reasonable start" as early as 1956 (R. 48) by adopting a

plan of desegregation. This plan provided for the desegregation of one grade each year commencing with the school term 1957-1958 in the first grade, one year at a time, until full integration should be accomplished. The plan continued progressively in that manner (R. 16-23, 48-49, 75-76).

Thereafter, in the opinion in the case of *Goss* v. *The Board of Education of the City of Knoxville, Tennessee,* 373 U.S. 683, this Court proscribed a voluntary transfer provision in a plan of desegregation substantially of the same terms as that included in the plan of the Special School District of Fort Smith. With reasonable dispatch the District revised its plan to eliminate the objectionable feature of voluntary transfer except as to a period of one year delay as to three predominately Negro elementary schools (R. 29-31, 40 and 58).

The revised plan operated to immediately integrate some three hundred Negro pupils into previously all white schools which was the integration of approximately one-third of all of the Negro pupils residing within the district (R. 63-64-66), and under the plan and as grades 9 through 12 will proceed to integrate, one each subsequent year after the school year 1964-65, there will and must necessarily be a geometrical increase in this integration of both white and Negro pupils in each successive school year. In fact, the enrollment records of the respondent district show that, under its plan approved by the courts below, of a total of 1,055 Negro pupils enrolled in all the district's schools in September, 1965, for the current 1965-66 school year, 844 (exactly four-fifths) are presently enrolled in and attending integrated schools in which white pupils are also presently enrolled, all in attendance in integrated classes.

This case (*Rogers* v. *Paul, et al.*, 232 F. Supp. 833, W. D. of Ark. 1964) was tried to the District Court, and the issues of fact were found in favor of the respondents. Upon review the case was affirmed by the Court of Appeals, Eighth Circuit (345 F.2d 117).

The District Court found that the School District, acting through its directors, had made a "prompt and reasonable start toward compliance with the Brown decision" and had proceeded with "all deliberate speed", 232 F. Supp. at page 840.

The Court of Appeals, in its opinion affirming the action of the District Court, said:

> "This determination is *factually* sound and was not induced by an erroneous concept of the controlling legal principles. The integration plan adopted by the local school board without compulsion, when evaluated in light of local conditions and administrative hurdles, convinces us that not only did the school board make a 'prompt and reasonable start toward full compliance', but that desegregation has in fact moved forward with 'all deliberate speed'." 345 F.2d at p. 122. (Emphasis supplied).

It is respondents' position that there are no issues in this case except factual issues, that is to say, the application of undisputed facts to accepted legal principles.

In the first instance, the directors of the Special School District of Fort Smith have been allowed to exercise their discretion in the adoption and application of a plan of desegregation. Thereafter, this plan and its good faith application was reviewed by the District Court, and that Court has exercised judicial discretion in determining the factual situation. Thereafter, the Court of Appeals has found the facts to be that the District Court correctly exercised its judicial discretion in determining

the factual situation, and the Court of Appeals has judicially found and determined that the facts support the respondents' position.

Petitioners are not now with this proceeding attempting to present any unique and unresolved legal question. To the contrary, petitioners seek only to have the facts reviewed by this Court.

ARGUMENT

I.

The Fort Smith Plan Is the Product of the Exercise of a Discretion by the Board of Directors Based upon Experience and Its Provisions Are Reasonable.

A. The pace of desegregation as reviewed by the District Court and affirmed by the Court of Appeals is not in conflict with standards established by this Court and the other Circuits.

There is no conflict between the decision below and the decisions of this Court and decisions of other Circuit Courts.

The petitioners took this same position in the Court of Appeals and urged the same authorities as cited in their present argument. These authorities were explored by the Court of Appeals (R. 40a, 41a; 345 F.2d at p. 123) and the opinion of the Court in each case was discussed by the Court of Appeals. No language could be clearer than that contained in the opinion (R. 40a; 345 F.2d at p. 122) where the Court said:

> "A cursory examination of these authorities reveals one unavoidable and most significant factual dissimilarity with the facts presented in this appeal. Among other important factual variances, every case involved situations where the school boards had either failed to act in good faith or after inordinate delays

had proposed a plan which was too slow and unduly protracted the process of desegregation. The courts were there confronted with proposed desegregation plans of the grade-a-year variety which were to commence from 5 to 10 years after the Supreme Court's first disposition of the Brown case in 1954."

When petitioners urge the universally recognized principle that good faith is not measured by "state of mind" but objectively by "required action" (Petitioners' Brief at page 15) they overlooked another equally well established guideline. This Court has recognized from the beginning that the duty and responsibility of compliance rests initially upon the shoulders of the directors and administrators of the school system. It remains only a factual question to be reviewed by the Court as to whether or not this duty and responsibility has been adequately undertaken and completed. The District Court inquired into the adequacy of the assumption and performance of this responsibility by the District. In affirming the action of the District Court, the Court of Appeals recognized that in fulfilling this responsibility the directors must competently cope with administrative problems and that they must make an adequate start toward full desegregation as based upon and in the face of the attendant local problems.

In other words, the District Court and the Court of Appeals have made a judicial determination of the facts which portray the administrative hurdles attendant upon the solution of the problem at the local level and in doing so reviewed the undisputed testimony relative to the number and significance of those hurdles attendant upon a fair and adequate solution. As stated by the Court of Appeals:

"But appellants argue further that there was no showing of valid administrative problems justifying

prolonging of complete desegregation for four additional years. We do not so read the record. Both appellants and appellees were satisfied to rely mainly on the testimony of the Superintendent of Schools of the Special School District of Fort Smith. His testimony in substance was that since the voluntary adoption of the desegregation plan in 1956, the Board has continuously been confronted with administrative problems arising out of: (a) school population growth and inadequacy of buildings and other facilities; (b) mass shifting within the District of School population from the older sections of Fort Smith to new suburban areas; (c) the huge building program entailing an expenditure of approximately $10,000,000; and (d) the transition of all of the schools into a regular 6-3-3 system. The Superintendent further stated that to require immediate desegregation of the four remaining grades would give rise to additional administrative problems and would greatly hamper what has to date been an orderly desegregation of the schools. That the Superintendent was qualified to express the foregoing opinion can hardly be gainsaid. He had been in the Fort Smith school system for 24 years as a principal, 4 years as assistant superintendent and 10 years as Superintendent. His uncontradicted testimony supports the conclusion that to compel immediate and complete integration would needlessly thwart the good faith efforts of the Board to accomplish de jure desegregation in a peaceful and orderly manner." (Petitioners' Brief at pages 39a, 40a; 345 F.2d at p. 122).

B. The record does not indicate that the Lincoln School provides grossly inferior education.

Again the petitioners seek with this proceeding to have a review by this Court of facts which have been judicially determined by the Court of Appeals. When the petitioners urge the "undeniably inferior Lincoln High School" (Petitioners' Brief at p. 17), they are urging upon this Court a question of fact which has been judicially determined adversely to this contention.

The facts with reference to this contention were thoroughly explored by the lower court and the following language appears in the opinion of the Court of Appeals:

"In support of their efforts to bring about full and immediate desegregation, appellants contend that Patricia Rogers and other Negro high school students similarly situated are subjected to an inferior as well as segregated education. More specifically, we are requested to direct the entry of an order permitting Patricia to transfer from Lincoln High School to Northside High School for the 1965-1966 school year in order that she may avail herself of an integrated education and be permitted to obtain instruction in journalism, music, and German, which are unavailable at Lincoln. In regard to the alleged inferior education available to Negro students, the Superintendent testified without contradiction that the Lincoln High School facilities have been regularly improved; and there exists an equal apportionment of teachers per pupil throughout the three high schools; that the per pupil operating cost for Lincoln was greater than the largest white high school; and that 'Lincoln High School has been accredited by the North Central Association since 1924, before that it was accredited by the Southern Association, and it meets fully the requirements of the students under requirements of the North Central Association for full accreditation.' Additionally, the Superintendent stated:

"'* * * you try to step up a curriculum based on the size and what the pupils request in the school. We have told all of our high schools, all three of them, that we would offer *any* course requested if there are as many as six students that want the course and we can find a teacher to teach it. Lincoln High School and Northside High School have been North Central accredited High Schools, the same length of time, I believe since 1924. The Southside High School is not accredited by the North Central Association at